DR CHAN CHIN CHEUNG

v.

CHAN CHAK CHEUNG & ANOR

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
ABDUL AZIZ MOHAMAD JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: W-02-473-2003]
18 MARCH 2005

CIVIL PROCEDURE: *Writ of summons - Service out of jurisdiction - Whether leave to serve notice required - Rules of the High Court 1980, O. 6 r. 6(1), O. 11 r. 4(3)*

CIVIL PROCEDURE: *Service - Out of jurisdiction - Action begun by writ seeking audit accounts of estate of deceased person - Whether service out of jurisdiction permissible - Whether action for administration of estate of deceased - Whether deceased died domiciled within jurisdiction - Rules of the High Court 1980, O. 11 r. 1(1)(d)*

CIVIL PROCEDURE: *Jurisdiction - Forum conveniens - Beneficiary commenced action seeking audit accounts of estate of deceased against trustees in Singapore - Appropriate forum to adjudicate matter - Whether Malaysian or Singapore courts*

The appellant was one of beneficiaries of the estate of one Chan Wing ('deceased'). The 2nd respondent was the sole surviving trustee of the estate as the 1st respondent had since passed away. At all material times the respondents resided in Singapore. The appellant, being dissatisfied with the respondents' conduct of the affairs of the estate of the deceased filed an action in the Kuala Lumpur High Court to obtain an order for an investigative audit of the accounts of the estate. As the respondents resided out of jurisdiction, the appellant obtained leave to issue and serve a notice of writ out of jurisdiction. The respondents entered conditional appearance and applied to set aside the order obtained by the appellant but their application was dismissed. The respondents then appealed to the judge in chambers who allowed the appeal on three grounds. Firstly, that the appellant obtained leave to serve the notice of writ out of jurisdiction without having first obtained leave to issue the writ as required by O. 6 r. 6(1) Rules of the High Court 1980 ('RHC'). Secondly, the deceased did not die domiciled in Malaysia and as most of his property was situated outside Malaysia, O. 11 r. 1(1)(d) and (e) RHC were

inapplicable. Thirdly, the appropriate forum to try the action commenced by the appellant was the court in Singapore. The appellant now appealed against the order of the learned judge.

Held (allowing the appeal)
Per Augustine Paul JCA:

[1] Form 13 RHC is the form of order to be used when leave to serve a notice of a writ out of jurisdiction is granted as provided by O. 11 r. 4(3) RHC. However, it also refers to the granting of leave to issue a notice of a writ out of jurisdiction. The granting of such leave is neither within O. 11 r. 4(3) RHC nor within O. 6 r. 6(1) RHC. There can be no dispute that O. 6 r. 6(1) RHC clearly refers to the issue of a writ of which notice is to be served out of the jurisdiction. Therefore, leave that is required to be obtained under O. 6 r. 6(1) RHC is for the issue of a writ and not notice of a writ. This is compounded by Practice Direction No 2 of 1982 ('PD'). (p 416 a-b)

[2] The words "writ or notice" in the first sentence of the PD indicates that O. 6 r. 6(1) RHC provides for leave in respect of a writ or notice of a writ when it is confined only to a writ. The words referred to must properly read as "writ notice of which" so that the PD will comply with O. 6 r. 6(1) RHC. Form 13 RHC and the PD are, therefore, not articulately worded and may be misleading. It has been held that failure to follow a new rule of court dealing with jurisdiction which had not been circulated or published in such a way as to come to the notice of practitioners was very pardonable thereby rendering it an irregularity that was curable. A similar result ought to follow when an existing rule has been improperly described in a manner and form which practitioners are expected to follow. The appellant therefore could not be faulted for the error. (p 416 e-g)

[3] Form 13 RHC contemplates a single application to be made for the purpose of O. 6 r. 6(1) RHC and O. 11 r. 4(3) RHC when the relevant rules seem to imply, on the fact of it, two separate applications. A single application for the purpose of both the rules is more appropriate as it would be pointless to obtain leave to issue a writ notice of which is required to be served when leave to serve the notice is subsequently refused. In the circumstances, the appellant's error in describing the application for leave to issue the writ as one for the issue of a notice of a writ was an irregularity that was curable. Accordingly, the order of court granting leave to issue the notice of writ shall be deemed to be one for the issue of the writ. (p 417 a)

[4] The trust property was located in Malaysia, Singapore and Hong Kong. It followed that O. 11 r. 1(1)(e) RHC was not applicable to the facts of the present case. That left for consideration the applicability of O. 11 r. 1(1)(d) RHC. Under this rule it must be shown that the action begun by the writ is for the administration of the estate of a person who died domiciled within the jurisdiction. The duty to render accounts is a constituent element of the administration of the estate of a deceased person. Therefore, the action commenced by the appellant asking for an account of the deceased's estate was for the administration of the estate of a person and the evidence showed that the place of domicile of the deceased at the time of his death was Malaya. The requirements of O. 11 r. 1(1)(d) were satisfied. Thus, the Malaysian courts had the jurisdiction to try the action filed by the appellant. (pp 417 h, 418 a-b, 419 d & 424 d-e)

[5] The action commenced by the appellant would involve an interpretation of the Will. This would raise questions of the applicable law with a resultant effect on the appropriate forum. The deceased made his Will on 5 February 1947 and he died on 27 February 1947. He was domiciled in Malaya at the time of his death. There was no indication by the deceased of the law pursuant to which the Will was to be interpreted. The applicable law for the interpretation of the Will should therefore be the laws of Malaysia. It is also established law that the administration of a deceased person's assets is governed wholly by the law of the country from which the personal representative derives his authority to collect them. Probate of the Will of the deceased was granted in Malaysia. Thus, the administration of the estate of the deceased must again be in accordance with Malaysian law. The law governing the relevant transaction is an important factor to be considered in determining the appropriate forum as it will have the most real and substantial connection with the action. The fact that the assets of the trust were situated in different jurisdictions was not a relevant matter for consideration. The fact that many of the beneficiaries were in different jurisdictions made no difference as they were not parties in the action. Another factor that would favour the action being tried in the court where probate was granted was the fact that the very position of the respondent being a trustee was being challenged in view of his residence in Singapore. That would have to be determined according to the laws of Malaysia. Therefore, the appropriate forum would be Malaysia. (p 427 a & d-h)

[6] The need to consider the question of the domicile of the deceased in the present case was relevant for two reasons. Firstly, it was one of the grounds relied on by the learned judge in arriving at his decision. Secondly, counsel for the respondents did not make any express concession on the issue of domicile. This was particularly significant in light of para. 19 of his written submission not abandoned by him. It was therefore a matter that required a decision by this court and must be addressed in the judgment. (p 428 c-d)

Per Abdul Aziz Mohamad JCA:

[1] On the question of O. 11 r. 1(1)(d) RHC, respondents' counsel contended only that the appellant's action was not one for the administration of the estate of the deceased. As to whether the deceased was domiciled in Malaya when he died, counsel contended that that question did not arise and he did not submit on it. By that it was understood to mean that counsel accepted for the purposes of the appeal that the deceased was domiciled in Malaya. Therefore that question did not arise for decision in the appeal. (p 428 f-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu adalah salah seorang benefisiari kepada pusaka seorang Chan Wing ('simati'). Responden kedua adalah satu-satu pemegang amanah kepada pusaka yang masih hidup, setelah responden pertama meninggal dunia. Kedua-dua responden pada waktu material menetap di Singapura. Perayu, yang tidak berpuas hati dengan cara responden-responden menguruskan hal ehwal pusaka simati, telah memfail tindakan di Mahkamah Tinggi Kuala Lumpur memohon perintah untuk membuat penyiasatan audit terhadap akaun-akaun pusaka. Oleh kerana responden-responden tinggal di luar bidang kuasa, perayu telah mendapat kebenaran untuk mengeluar dan menyerahkan writ di luar bidang kuasa. Responden-responden memasuki kehadiran bersyarat dan memohon untuk mengenepikan perintah yang diperolehi oleh perayu, tetapi permohonan mereka telah ditolak. Responden-responden kemudian merayu kepada hakim dalam kamar dan rayuan dibenarkan atas tiga alasan. Pertama, perayu telah mendapat kebenaran untuk membuat serahan di luar bidang kuasa tanpa terlebih dahulu mendapatkan kebenaran untuk mengeluarkan writ seperti yang dikehendaki oleh A. 6 k. 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Kedua, simati semasa meninggal dunia tidak berdomisil di Malaysia dan oleh kerana sebahagian besar dari pusakanya berada di luar Malaysia, A. 11 k. 1(1)(d) dan (e) KMT tidak terpakai. Ketiga, forum yang sesuai untuk membicarakan tindakan yang dimulakan oleh perayu adalah mahkamah di Singapura. Perayu telah merayu terhadap keputusan yang arif hakim.

Diputuskan (membenarkan rayuan)
Oleh Augustine Paul HMR:

[1] Seperti yang diperuntukkan oleh A. 11 k. 4(3) KMT, Borang 13 KMT adalah borang perintah yang harus digunakan apabila kebenaran diberi bagi membuat serahan notis writ di luar bidang kuasa. Bagaimanapun, ia juga merujuk kepada pemberian kebenaran untuk mengeluarkan notis writ di luar bidang kuasa. Pemberian kebenaran sedemikian tidak dirangkumi oleh A. 11 k. 4(3) mahupun oleh A. 6 k. 6(1) KMT. Tidak diragukan bahawa A. 6 k. 6(1) KMT jelas merujuk kepada pengeluaran writ di mana notis hendak diserahkan di luar bidang kuasa. Oleh yang demikian, kebenaran yang perlu diperolehi di bawah A. 6 k. 6(1) adalah untuk pengeluaran writ dan bukannya notis writ. Ini disokong oleh Arahan Amalan No 2 Tahun 1982 ('AA')

[2] Perkataan-perkataan "writ atau notis" di dalam ayat pertama AA menunjukkan bahawa A. 6 k. 6(1) KMT memberi ruang untuk kebenaran berhubung dengan writ atau notis writ apabila ianya terhad kepada writ. Perkataan-perkataan yang dirujuk secara betulnya harus dibaca sebagai "notis writ yang mana" bagi menjadikan AA mematuhi A. 6 k. 6(1) KMT. Borang 13 KMT dan AA dengan itu, tidak digubal dengan baik dan boleh membawa kepada salah tanggap. Telah diputuskan bahawa, kegagalan mematuhi sesuatu kaedah mahkamah baru berhubung dengan bidang kuasa yang tidak diedar atau diterbitkan dengan cara yang boleh membawanya kepada pengetahuan pengamal-pengamal adalah kegagalan yang boleh dimaafkan sekaligus menjadikannya suatu ketidakteraturan yang boleh dipulihkan. Keputusan yang serupa harus mengikut apabila kaedah sedia ada tidak dihurai dengan baik bagi membolehkan pengamal-pengamal mematuhinya. Perayu dengan itu tidak boleh dipersalahkan atas kesilapan sedemikian.

[3] Borang 13 menjangkakan hanya satu permohonan dibuat bagi maksud A. 6 k. 6(1) dan A. 11 k. 4(3) KMT, sedangkan kaedah-kaedah yang relevan, di atas fakta, kelihatan menzahirkan dua permohonan yang berasingan. Suatu permohonan tunggal bagi maksud kedua-dua kaedah adalah lebih wajar, kerana adalah sia-sia untuk mendapat kebenaran untuk mengeluarkan writ di mana notisnya perlu diserah apabila kebenaran untuk menyerahkan notis ditolak kemudiannya. Dalam halkeadaan sedemikian, kesilapan perayu kerana menggambarkan permohonan untuk kebenaran untuk mengeluarkan writ sebagai kebenaran untuk mengeluarkan notis writ adalah suatu ketidakteraturan yang boleh dipulihkan. Oleh yang demikian, perintah mahkamah yang membenarkan pengeluaran notis writ hendaklah dianggap sebagai kebenaran untuk pengeluaran writ.

[4] Harta-harta amanah berada di Malaysia, Singapura dan Hong Kong. Ianya mengikut bahawa A. 11 k. 1(1)(e) KMT tidak berkaitan dengan fakta kes di sini. Maka yang tinggal adalah soal keterpakaian A. 11 k. 1(1)(d) KMT. Di bawah kaedah ini, ia mesti dibuktikan bahawa tindakan yang dimulakan dengan writ adalah untuk pentadbiran pusaka seseorang yang semasa kematiannya adalah berdomisil di dalam bidang kuasa. Tugas menyediakan akaun adalah suatu elemen yang konsisten dalam pentadbiran pusaka seorang simati. Oleh yang demikian, tindakan yang dimulakan oleh perayu memohon akaun-akaun pusaka simati adalah untuk pentadbiran pusaka sesesorang dan keterangan menunjukkan bahawa domisil simati semasa kematiannya adalah Malaya. Maka kehendak A. 11 k. 1(1)(d) telah dipenuhi. Mahkamah Malaysia, dengan itu, mempunyai bidang kuasa untuk membicarakan tindakan yang difail perayu.

[5] Tindakan yang dimulakan perayu akan melibatkan pentafsiran Wasiat. Ini akan membangkitkan soal undang-undang yang terpakai serta soal forum yang sesuai. Simati membuat Wasiatnya pada 5 Februari 1947 dan meninggal dunia pada 27 Februari 1947. Beliau berdomisil di Malaysia semasa kematiannya. Simati tidak memberi sebarang tanda mengenai undang-undang di sisi mana Wasiatnya harus ditafsirkan. Undang-undang yang patut dipakai bagi mentafsirkan Wasiat, dengan itu, haruslah undang-undang Malaysia. Selain itu, sudah menjadi undang-undang mantap bahawa pentadbiran aset-aset seorang yang mati harus dikawal sepenuhnya oleh undang-undang di negeri di mana wakil-wakil diri memperoleh kuasa untuk mengumpulnya. Probet bagi Wasiat simati telah diberikan di Malaysia. Maka, sekali lagi, pentadbiran bagi pusaka simati haruslah dilaksanakan mengikut undang-undang Malaysia. Undang-undang yang mengawal transaksi yang relevan adalah faktor penting yang perlu dipertimbang dalam menentukan forum sesuai kerana ia mempunyai hubungan yang paling teguh dengan tindakan. Fakta bahawa aset-aset amanah berada di bidang kuasa-bidang kuasa yang berbeza bukanlah faktor relevan untuk dipertimbang. Fakta bahawa ramai dari benefisiari berada dalam bidang kuasa-bidang kuasa yang berbeza tidak memberi apa-apa erti kerana mereka bukanlah pihak-pihak kepada tindakan. Satu faktor lain yang memihak kepada tindakan dibicarakan di mahkamah di mana probet dikeluarkan adalah fakta bahawa kedudukan responden sendiri sebagai pemegang amanah telah dicabar memandangkan dia tinggal di Singapura. Itu perlu diputuskan mengikut undang-undang Malaysia. Dengan itu, forum yang sesuai adalah Malaysia.

[6] Keperluan untuk menimbang persoalan domisil simati dalam kes semasa menjadi relevan kerana dua sebab. Pertama, ia merupakan salah satu dari alasan di atas mana yang arif hakim bersandar dalam mencapai keputusannya. Kedua, peguam responden tidak secara nyata membuat apa-apa konsesi terhadap persoalan domisil. Ini amat penting terutama memandangkan bahawa perenggan 19 penggulungan bertulis beliau tidak digugurkan olehnya. Ia dengan itu merupakan suatu perkara yang memerlukan keputusan mahkamah ini dan perlu diberi perhatian di dalam penghakiman.

Oleh Abdul Aziz Mohamad HMR:

[1] Berhubung persoalan A. 11 k. 1(1)(d) KMT, peguam responden-reponden berhujah bahawa tindakan perayu adalah untuk pentadbiran pusaka simati. Berkenaan sama ada simati semasa kematiannya berdomisil di Malaya, peguam berkata bahawa persoalan tersebut tidak berbangkit lantas tidak menggulung mengenainya. Dengan cara itu, peguam difahamkan sebagai telah mengakui, bagi maksud rayuan, bahawa simati telah berdomisil di Malaya. Oleh yang demikian, persoalan tersebut tidak berbangkit untuk keputusan di dalam rayuan.

Case(s) referred to:

American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***
Att-Gen v. Rowe [1862] 1 H & C 42 ***(refd)***
Bell v. Kennedy [1868] LR 1 Sc & Div 307 ***(refd)***
Bowie (or Ramsay) v. Liverpool Royal Infirmary [1930] AC 588 ***(refd)***
Charron v. Montreal Trust Co [1958] 15 DLR (2d) 240 ***(refd)***
Crookenden v. Fuller [1859] 1 Sw & Tn 441 ***(refd)***
D'Etchegoyen v. D'Etchegoyen [1888] 13 PD 132 ***(refd)***
Donaldson v. Donaldson [1949] P 363 ***(refd)***
Drevon v. Drevon [1864] 34 LJ Ch 129 ***(refd)***
Eg Puttick v. A-G [1980] Fam 1 ***(refd)***
Forbes v. Forbes [1854] Kay 341 ***(refd)***
Fremlin v. Fremlin [1913] 16 CLR 212 ***(refd)***
Gulbenkian v. Gulbenkian [1937] 4 All ER 618 ***(refd)***
IRC v. Bullock [1976] 3 All ER 353 ***(refd)***
IRC v. Duchess of Portland [1982] Ch 314 ***(refd)***
Munro v. Munro [1840] 7 Cl & Fin 842 ***(refd)***
Preston v. Melville [1841] 8 C1 & F1 ***(refd)***
Qureshi v. Qureshi [1972] Fam 173 ***(refd)***
Re Annesley [1926] Ch 692 ***(refd)***
Re De Almeda [1902] 18 TLR 414 ***(refd)***
Re Eu Keng Chee [1961] MLJ 210 ***(refd)***

Re Fuld's Estate (No 3) [1968] P 675 ***(refd)***
Re Kloebe [1884] 28 Ch D 175 ***(refd)***
Re Lorillard [1922] 2 Ch 638 ***(refd)***
Re Lloyd Evans [1947] Ch 695 ***(refd)***
Re Mohamed Said Nabi [1965] 1 MLJ 121 ***(refd)***
Re Tan Hong [1962] MLJ 535 ***(refd)***
Ross v. Ross [1930] AC 1 ***(refd)***
Saccharin Corporation Ltd v. Chemische Fabrik von Heydon [1911] 2 KB 516 ***(refd)***
Scappaticci v. A-G [1955] 1 All ER 193 ***(refd)***
Spiliada Maritime Corp v. Cansulex Ltd [1987] 1 AC 460 ***(refd)***
Stevenson v. Masson [1873] LR 17 Eq 78 ***(refd)***
Udny v. Udny [1869] LR 1 Sc & Div 441 ***(refd)***
White v. Tenant 31 W Va 790 ***(refd)***
Winans v. A-G [1904] AC 287 ***(refd)***
Wong Kai Woon & Anor v. Wong Kong Hom & Anor [1991] 3 CLJ 3057; [1991] 4 CLJ (Rep) 1183 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 6(1), O. 11 rr. 1(1)(d), (e), 4(3), Form 13
Trustee Act 1949, s. 40(1)

Other source(s) referred to:
Aiyar's Judicial Dictionary, 11th edn, pp 48-49
Chan King Nui, *From Poor Migrant to Millionaire*, p 24
Cheshire and North's, *Private International Law*, 12th edn, pp 142, 147-148
Dicey & Morris, *The Conflict of Laws*, 13th edn, vol 1, p 109
Halsbury's Laws of Malaysia, vol 5, p 720
Tan Yock Lin, *Conflict Issues in Family and Succession Law*, p 123

For the appellant - Ong Kim Buai (Chong Boon Cheak, R Rajaswari & Syamsuriatina Ishak with her); M/s Tay, Tee & Nasir
For the respondents - Robert Lazar (Dhinesh Bhaskaran & David Soosay with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: S5-22-267-2002]

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul JCA:
By an order of court dated 18 March 2002 the appellant (the plaintiff in the court below) obtained leave to issue and serve a notice of writ out of jurisdiction on the first and second respondents (the defendants in the court below). This appeal concerns the validity of the said order.

The appellant is one of the beneficiaries of the estate of Chan Wing ("the deceased"). The second respondent is the sole surviving trustee of the estate; the first respondent having passed away on 7 May 2003. At all material times the respondents resided in Singapore. The appellant, being dissatisfied with the respondents' conduct of the affairs of the estate, filed an action in the Kuala Lumpur High Court to obtain an order for an investigative audit of the accounts of the estate. As the respondents resided out of jurisdiction the appellant obtained leave to issue and serve a notice of writ out of jurisdiction. The respondents entered conditional appearance on 26 April 2002 and applied to set aside the order obtained by the appellant. On 8 January 2003 the senior assistant registrar dismissed the application. The respondents appealed to the judge in chambers who allowed the appeal on three grounds. They are, firstly, the appellant had obtained leave to serve the notice of writ out of jurisdiction without first having obtained leave to issue the writ as required by O. 6 r. 6(1)of the Rules of the High Court 1980 ("the first ground"); secondly, as the deceased did not die domiciled in Malaysia and as about 90% of his property is situated outside Malaysia this case does not come within the scope of O. 11 r. 1(1)(d) and (e) of the Rules of the High Court 1980 in order to qualify for the grant of leave to serve the notice of writ out of jurisdiction ("the second ground"); and, thirdly, the appropriate forum to try the action commenced by the appellant is the court in Singapore ("the third ground"). This appeal by the appellant is against the order made by the learned judge.

We gave anxious consideration to the arguments advanced by learned counsel for both parties in respect of the three grounds relied on by the learned judge in arriving at our conclusion.

(a) The First Ground

The material part of the judgment of the learned judge in respect of this ground reads as follows:

> Berdasarkan kepada kes *Seasiana Sdn Bhd v. Saab Scania* yang telah dinyatakan di atas, Mahkamah juga memutuskan tindakan Plaintif yang telah memohon terus menurut Aturan 11 Kaedah 4 tanpa mengambil langkah seperti yang dikehendaki oleh Aturan 6 Kaedah 6 dan Arahan Amalan No 2 tahun 1982 adalah merupakan satu kesilapan yang fatal.

It is perhaps necessary to set out the relevant rules of the Rules of the High Court 1980 that deal with the obtaining of leave to issue a writ notice of which is to be served out of the jurisdiction and for service of the notice of writ in order to appreciate the arguments advanced before us.

Order 6 r. 6

(1) No writ notice of which is to be served out of the jurisdiction shall be issued without the leave of the court.

(2) A plaintiff or his solicitor must, on presenting a writ for sealing, leave with the registrar the original and a copy together with as many copies thereof as there are defendants to be served.

(3) The registrar shall assign a serial number to the writ and shall sign, seal and date the writ whereupon the writ shall be deemed to be issued.

(4) The original writ must be filed in the registry and an entry thereof made in the cause book.

Order 11 r. 1 And r. 4

1(1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of:

…

service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say:

…

(d) if the action begun by the writ is for the administration of the estate of a person who died domiciled within the jurisdiction or if the action begun by the writ is for any relief or remedy which might be obtained in any such action as aforesaid;

(e) if the action begun by the writ is for the execution, as to property situated within the jurisdiction, of the trusts of a written instrument, being trusts that ought to be executed according to law and of which the person to be served with the writ is a trustee or if the action begun by the writ is for any relief or remedy which might be obtained in any such action as aforesaid;

…

4(1) An application for the grant of leave under rule 1 or 2 must be supported by an affidavit in Form 12 stating the grounds on which the application is made and that in the deponent's belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably may be found.

(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

(3) An order in Form 13 granting under rule 1 or 2 leave to serve a notice of a writ out of the jurisdiction must limit a time within which the defendant to be served must enter an appearance.

The background of this appeal is a summons in chambers dated 14 March 2002 filed by the appellant pursuant to which he had applied for leave to issue a notice of a writ against the intended defendants and for leave to serve the notice of the writ out of jurisdiction. The application was allowed by the senior assistant registrar. The relevant part of the order of court that was granted reads as follows:

PERINTAH UNTUK PENGELUARAN DAN PENYAMPAIAN NOTIS WRIT SAMAN DI LUAR BIDANG KUASA

ATAS PERMOHONAN daripada DR CHAN CHIN CHEUNG bakal Plaintif dan setelah membaca afidavit DR CHAN CHIN CHEUNG yang difailkan pada 14 haribulan Mac 2002 dan setelah mendengar PARAMESWARY A/P G SUPRAMANIAM

ADALAH DIPERINTAHKAN bahawa bakal Plaintif mendapat kebenaran untuk mengeluarkan suatu notis bagi writ saman terhadap bakal Defendan-Defendan dan untuk menyampaikan notis writ tersebut kepada bakal Defendan Pertama di 16-A, Jalan Novena Barat, Singapore 1130 dan di No 581 Orchard Road #02-19, Singapore 238883 atau di tempat lain di Singapura dan kepada bakal Defendan Kedua di 42, Margoliouth Road, Singapore 1025 dan di No 581 Orchard Road #02-19, Singapore 238883 atau di tempat lain di Singapura.

The objection taken by learned counsel for the respondent to the procedure adopted by the appellant is two-fold. First, O. 6 r. 6(1) refers to the issue of a writ while the order of court obtained by the appellant refers to the issue of a notice of a writ. Second, there ought to have been two separate applications for leave under O. 6 r. 6(1) and O. 11 and not one praying for leave under both the rules as done by the appellant. In reply learned counsel for the appellant contended that as O. 11 refers to a notice of a writ O. 6 r. 6(1) should also be similarly construed. In support she referred to Form 13 in the Rules of the High Court 1980. The material parts of Form 13 read as follows:

Upon the application of … the intended plaintiff and upon reading the affidavit of … filed the … day of … 19 … and upon hearing

It is ordered that the intended plaintiff have leave to issue a notice of a writ of summons (or originating summons) (or as may be) against the intended defendant and to serve the said notice of writ on him at (address at which intended defendant to be served) or elsewhere in (name of country within which service to be effected.

Form 13 is the form of order to be used when leave to serve a notice of a writ out of jurisdiction is granted as provided by O. 11 r. 4(3). However it also refers to the granting of leave to issue a notice of a writ out of jurisdiction. The granting of such leave is not within O. 11 r. 4(3) nor O. 6 r. 6(1). There can be no dispute that O. 6 r. 6(1) clearly refers to the issue of a writ of which notice is to be served out of the jurisdiction. Thus the leave that is required to be obtained under O. 6 r. 6(1) is for the issue of a writ and not notice of a writ. This is compounded by Practice Direction No 2 of 1982. It reads as follows:

> Issue of Writ for Service out of the jurisdiction
>
> Order 6 rule 6(1) of the Rules of the High Court 1980 provides that no writ or notice which is to be served out of the jurisdiction under Order 11 shall be issued without the leave of the court. Before applying for leave for service of process out of the jurisdiction under Order 11, the applicant will have to produce the proposed writ or originating summons (in relation to which Order 6 rule 6 equally applies by virtue of the provisions of Order 7 rule 5) and the summons for leave to issue it to the registrar who will provisionally assign a serial number to the writ and summons. After an order for issue and service has been made under Order 11, the registrar shall issue the writ or notice completed in accordance with the terms of the order.

The words "writ or notice" in the first sentence of the Practice Direction indicates that O. 6 r. 6(1) provides for leave in respect of a writ or notice of a writ when it is confined only to a writ. The words referred to must properly read as "writ notice of which" so that the Practice Direction will comply with O. 6 r. 6(1). Form 13 and the Practice Direction are therefore not articulately worded and may be misleading. It is perhaps worth referring to *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 where it was held that failure to follow a new rule of court dealing with jurisdiction which had not been circulated or published in such a way as to come to the notice of practitioners "… was very pardonable" thereby rendering it an irregularity which was curable. A similar result ought to follow when an existing rule has been improperly described in a manner and form which practitioners are expected to follow. The appellant cannot therefore be faulted for the error. Learned counsel for the respondent Mr Robert Lazar recognised this and in a fine display of the highest traditions of the Bar graciously conceded that the error made by the appellant may not be fatal. It must also be observed that Form 13 contemplates a single application to be made for the purpose of O. 6 r. 6(1) and O. 11 r. 4(3) when the relevant rules seem to imply, on the face of it, two separate applications. In our opinion a single application for

the purpose of both the rules is more appropriate as it would be pointless to obtain leave to issue a writ notice of which is required to be served when leave to serve the notice is subsequently refused. In the circumstances of this case it is our view that the error in describing the application for leave to issue the writ as one for the issue of a notice of a writ by the appellant is an irregularity that is curable; and, accordingly, the order of court dated 18 March 2002 granting leave to issue the notice of writ shall be deemed to be one for the issue of the writ.

It follows that the appellant must succeed in the first ground.

(b) The Second Ground

The material part of the judgment of the learned judge in respect of this ground reads as follows:

> Dari fakta-fakta dalam kes ini Mahkamah berpendapat bahawa Defendan-Defendan adalah merupakan penduduk tetap Singapura. Estet simati telah ditadbir di Singapura selama lebih 21 tahun dan hampir lebih dari separuh aset simati terletak di Singapura dan selebihnya di Hong Kong dan hanya sebahagian kecil iaitu 10.25% terletak di Malaysia. Majoriti waris kepada harta simati tinggal di Singapura. Simati juga tidak berdomisil di Malaysia pada masa beliau meninggal dunia.
>
> Oleh itu penyiasatan odit yang dipohon oleh Plaintif di dalam kes ini adalah sesuai dan mudah diputuskan oleh Mahkamah di Singapura.
>
> Berdasarkan kepada semua fakta yang dinyatakan di atas dan fakta bahawa simati semasa meninggal dunia tidak berdomisil di Malaysia dan hamper 90% harta pusaka simati tidak terletak di Malaysia, maka tuntutan Plaintif di sini juga tidak termasuk di dalam skop peruntukan Aturan 11 Kaedah 1(1)(d) dan (e) KKMT 1980.

The appellant is relying on O. 11 r. 1(1)(d) and (e) in order to entitle him to serve the notice of the writ out of the jurisdiction. We shall consider r. 1(1)(e) first. It relates to an action begun by a writ for the execution of trusts as to property situated within the jurisdiction, etc or an action begun by a writ for any relief or remedy which might be obtained "in any such action as aforesaid". It contemplates two instances of an action begun by a writ. In the first instance it is clear that the property must be situated within the jurisdiction. The use of the words "… in any such action as aforesaid" in the second instance is a reference to a similar writ as described in the first instance, that is to say, it must also be in respect of property situated within the jurisdiction. In this case the trust property is located in Malaysia, Singapore and Hong Kong. It follows that O. 11 r. 1(1)(e) is not applicable to the facts

of this case. That leaves for consideration the applicability of Order 11 r. 1(1)(d). Under this rule it must be shown that the action begun by the writ is for the

(i) administration of the estate of a person

(ii) who died domiciled within the jurisdiction

The two requirements will now be considered.

(i) Administration Of The Estate Of A Person

The action begun by the writ must be for the administration of the estate of a person. The question to be determined in this requirement is whether the action commenced by the appellant asking for an account of the deceased's estate on the footing of wilful default and for an investigative audit to be conducted in respect of the accounts of the deceased's estate is for the administration of the estate of a person. An action brought to administer the estate of a deceased person is referred to as an administration action. It is explained in *Aiyar's Judicial Dictionary*, 11th edn at pp 48-49 in the following terms:

> Administration action. An action brought to administer the estate of a deceased person. Such an action may be begun by anyone interested in the estate, whether as a trustee, executor, administrator, legatee, heir or creditor. An action of this kind is generally brought by beneficiaries, who think the trustees or executors are wasting the assets or have been guilty of misconduct; or by creditors who desire to have the estate wound-up with the protection of the court. As soon as the action starts, the trustee or executors can no longer deal with the estate. He cannot pay either a debt or legacy, but must await the Court's orders. Generally, the Court orders that certain accounts and inquiries be taken and made. The account and inquiries ordered are usually:
>
> (a) of the funeral and testamentary expenses,
>
> (b) of debts due from the estate,
>
> (c) of the dealings which have already taken place,
>
> (d) of the assets,
>
> (e) of the legacies, etc and who are entitled to them,
>
> (f) of all other persons interested.

A trustee is obliged to render accounts of the trust property to a beneficiary. In this regard reference is made to *Halsbury's Laws of Malaysia*, vol 5 which says at p. 720:

> A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information or the means of obtaining information as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust. If the trustee neglects or fails to do so, he is liable for the costs of proceedings to compel production of information or accounts. He must also allow a beneficiary to inspect the trust accounts and all documents relating to the trust, and has a duty to explain to a beneficiary what his rights are.

And at p. 855:

> One of the remedies available against the personal representative of a deceased person for those seeking information about the deceased person's estate is to be supplied with an account of it. It is the imperative duty of the personal representative to keep proper accounts from the time he begins to administer the estate so as to render proper account to any beneficiary who demands the same throughout the administration of the estate.

The duty to render accounts is therefore a constituent element of the administration of the estate of a deceased person. The action brought by the appellant against the respondent is therefore one for the administration of the estate of the deceased.

(ii) The Deceased Died Domiciled Within The Jurisdiction

It must be stressed that what this requirement contemplates is the place of domicile of a person at the time of his death and not death in the place of domicile. This is explained in the American case of *White v. Tenant* 31 W Va 790, 8 SE 596 (1888). In that case a man abandoned his home in State X and took his family to a house in State Y, about half a mile from X, intending to live there permanently. Having deposited his belongings there, he and his family returned to X, in order to spend the night with a relative. He fell ill and died there. It was held that his domicile at death was in Y.

The object of determining a person's domicile is to connect him for the purpose of a particular inquiry with some system or rule of law (see *Dicey & Morris The Conflict of Laws,* 13th edn, vol 1 p 109). Thus for the purpose of any inquiry a person cannot have more than one domicile (see *Udny v. Udny* [1869] LR 1 Sc & Div 441; *Saccharin Corporation Ltd v. Chemische Fabrik von Heydon* [1911] 2 KB 516). The requirements to be satisfied to determine the place of domicile of a person are explained in *Cheshire and North's Private International Law,* 12th edn, at p 142:

> The two requisites for the acquisition of a fresh domicile are residence and intention. It must be proved that the person in question established his residence in a certain country with the intention of remaining there permanently. Such an intention, however unequivocal it may be, does not per se suffice. These two elements of residence and intention must concur, but this is not to say that there be unity of time in their concurrence. The intention may either precede or succeed the establishment of the residence. The emigrant forms his intention before he leaves England for Australia; the émigré who flees from persecution may not form it until years later.

Residence and intention are inter-related in that, strictly speaking, residence is a fact, though a necessary one, from which intention may be inferred (see *Munro v. Munro* [1840] 7 Cl & Fin 842). Residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it (see *IRC v. Duchess of Portland* [1982] Ch 314). Several cases have attached less weight to the length of residence and have taken the view that although a material consideration, it is rarely decisive (see *Winans v. A-G* [1904] AC 287; *Bowie (or Ramsay) v. Liverpool Royal Infirmary* [1930] AC 588; *Eg Puttick v. A-G* [1980] Fam 1). It depends on the circumstances of each case as the facts will disclose the reason for a person's presence in a country. On the other hand the intention to reside in a country must be one that is permanent. In *Udny v. Udny* [1869] LR 1 Sc & Div 441 intention was described as being one to reside "for an unlimited time". In *Re Fuld's Estate (No 3)* [1968] P 675 it was described as one that is indefinite. In commenting on the evidence necessary to establish intention *Cheshire and North's Private International Law*, 12th edn says at pp 147-148:

> The traditional statement that there must be a present intention of permanent residence merely means that so far as the mind of the person at the relevant time was concerned he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past or present. If, for example, the inquiry relates to the domicile of a deceased person, it must be ascertained whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country. Once this is established, evidence of his subsequent fluctuations of opinion as to whether he would or would not move elsewhere will be ignored (*Re Marrett, Chalmers v. Wingfield* [1887] 36 Ch D 400.

The learned authors then referred to circumstances which have been regarded as relevant criteria of intention. They are naturalisation (see *Qureshi v. Qureshi* [1972] Fam 173); retention of citizenship (see *IRC v. Bullock* [1976] 3 All ER 353); purchase of a house (see *D'Etchegoyen v. D'Etchegoyen* [1888] 13 PD 132); purchase of a burial ground (see *Stevenson v. Masson* [1873] LR 17 Eq 78); the exercise of political rights (see *Drevon v. Drevon* [1864] 34

LJ Ch 129); the establishment of children in business (see *Stevenson v. Masson* [1873] LR 17 Eq 78); the statutory declaration made by a candidate for naturalisation that he intends to reside permanently in the United Kingdom (see *Gulbenkian v. Gulbenkian* [1937] 4 All ER 618); the place where a man's wife and family reside (see *Forbes v. Forbes* [1854] Kay 341); departure from a country owing to compulsion of war (see *Re Lloyd Evans* [1947] Ch 695); the refusal of a foreign fiancée to leave her own country (see *Donaldson v. Donaldson* [1949] P 363); and statements as to his domiciliary intentions made by a deceased person in his lifetime (see *Scappaticci v. A-G* [1955] 1 All ER 193). The learned authors then added at p 149:

> Undue stress must not be laid on any single fact, however impressive it may appear when viewed out of its context, for its importance as a determining factor may well be minimised when considered in the light of other qualifying events. Again, no one fact is of constant value, for every case varies in its circumstances, and what is of decisive importance in one may be of little weight in another.

It is the contention of the appellant that the place of domicile of the deceased is Malaysia while the respondent contends that it is China. The appellant's case is that the deceased came to Malaya in 1889. At the commencement of the Second World War he fled to Australia. After the war when he was on his way back to Malaya he broke his journey in Singapore to seek medical treatment. He died in Singapore in 1947. However he was buried in Kuala Lumpur. In the Will executed by him he has described himself as being "… of No 59, Taylor Road, Kuala Lumpur, but now temporarily residing at No 43 Ridout Road, Singapore …". Probate of the Will was taken in Kuala Lumpur and re-sealed in Singapore. During his lifetime the deceased was a very successful businessman. Although he was based in Malaya he had business interests in Singapore, Thailand, Hong Kong and other countries. A substantial part of his assets was held in Chan Wing & Co Ltd, a company in Malaya and owned by him. In 1906 he was invited to sit on the Board of Directors of the Confucian Chinese School in Kuala Lumpur. He was one of the founders of the Kwong Yik Bank in Kuala Lumpur in 1913. He was made a Justice of the Peace in the 1930s. In 1933 he built what is now Istana Negara to be his family home. Jalan Chan Wing in Pudu is named after him. One of his daughters Chan King Nui wrote a book on him entitled From Poor Migrant to Millionaire (Chan Wing: 1973 – 1947). At p. 24 of the book she says:

> Right from the first day of his arrival in Malaya, he had liked the country and now that the tin mine was so productive, he was very sure he would remain here for good. With this certainty, he made an important decision. He would never go back to live in China. So he cut off his queue. It was an act of defiance and was a vote of no-confidence in the Manchu Government.

In his introduction to the book Professor Dato Khoo Kay Kim of the Department of History, University of Malaya said:

> Chan Wing's active life in Kuala Lumpur spanned a period of about half a century.

The deceased is listed in the Biographical Dictionary of the Chinese in Malaysia (1997) by Lee Kam Hing and Chow Mun Seong. The case for the respondent, on the other hand, is that the deceased was the holder of a passport issued by the People's Republic of China and was a permanent resident of Malaya. It was issued in Kuala Lumpur and was valid from 1936 – 1939. It was averred that during the Second World War the deceased was a refugee in Australia and subsequently resided permanently in Singapore at all material times. It was further averred that the entry in the Memorandum of Resealing issued by the Singapore High Court stating that at the time of his death the deceased's domicile is China supports the argument that the place of domicile of the deceased is China.

There is sufficient evidence to establish the deceased's place of domicile. He had been resident in Malaya for a very long period of time. Even though he died in Singapore he was buried in Malaya where he had his family home. He had substantial business interests in Malaya most of which were held in a company called Chan Wing & Co Ltd. In Malaya a road was named after him; he was a member of the Board of Directors of a school and was a Justice of the Peace. As his daughter said in her book he liked Malaya and had decided that he would never go back to live in China. The declaration in his Will of his Malayan address with a description of the Singapore address as "temporary", insufficient on its own, but coupled with his length of residence in Malaya and the accumulation of a vast business empire here together with his exalted assimilation into the Malayan society shows that he had abandoned his original place of domicile and had made Malaya his permanent home which is therefore his domicile of choice. There is a presumption that a person continues to be domiciled in the country in which he is domiciled (see *Att-Gen v. Rowe* [1862] 1 H & C 42; *Bell v. Kennedy* [1868] LR 1 Sc & Div 307; *Re De Almeda* [1902] 18 TLR 414). The burden of proving a change of domicile lies on those who assert it (see *Winans v. Att-Gen* [1904] AC 287; *Fremlin v. Fremlin* [1913] 16 CLR 212). The appellant has established that

the domicile of choice of the deceased is Malaya. The burden of proof therefore shifts to the respondent to show that the deceased had revived his domicile of origin. The principal argument of the respondent in support of his case that the deceased died domiciled in China is that he was the holder of a passport of the People's Republic of China and that the Memorandum of Resealing states that the deceased's place of domicile is China. A person's original domicile is what he acquires at birth. But as the book entitled *Conflict Issues in Family and Succession Law* by Tan Yock Lin says at p. 123:

> A man who is a citizen or subject of one country may be domiciled in another.

Once there is evidence of a fresh place of domicile the original place of domicile is deemed to be abandoned unless there is an intention to revive the original place of domicile. In further support reference is made to *Bowie (or Ramsay) v. Liverpool Royal Infirmary* [1930] AC 588. In that case one George Bowie was born in Glasgow in 1845 with a Scottish domicile of origin. He gave up his employment as a commercial traveller at the age of thirty-seven and refused to do any more work during the remaining forty-five years of his life. But even the idle must be fed, and after residing with his mother and sisters in Glasgow, he moved his residence to Liverpool in 1892 in order to live on the bounty of his brother. At first he lived in lodgings, but moved to his brother's house when the latter died twenty-one years later, and resided there with his sole surviving sister until she died in 1920. He remained there until his own death in 1927. Thus George Bowie lived in England for the last thirty-six years of his life. During his life time he had refused to return to Glasgow and had arranged for his own burial in Liverpool. The House of Lords held unanimously that George Bowie died domiciled in Scotland. Their Lordships denied that his prolonged residence disclosed an intention to choose England as his permanent home. They inferred that had his English source of supply failed he would have retreated to Glasgow. That, however, cannot be said of the deceased in this case in view of his substantial financial interests in Malaya. The next matter to be considered is whether the entry in the Memorandum of Resealing supports the argument that the deceased's place of domicile is China. A declaration of intent whether in a Will or other document has been described as the lowest species of evidence (see *Crookenden v. Fuller* [1859] 1 Sw & Tn 441). They have to be treated with great reserve (see *Bates v. Bates* [1951] MLJ 95). Their weight is slight unless shown to be acted upon or unless consistent with or fortified by conduct subsequent to such declaration (see *Ross v. Ross* [1930] AC 1). If inconsistent with such conduct they must be disregarded (see *Re Annesley* [1926] Ch 692; *Re Fuld (No 3)* [1968] P 675). Thus in *Re Mohamed Said Nabi* [1965] 1 MLJ 121 Chua J rejected the testator's declaration made in his will that he was

domiciled in Hong Kong in view of his acquisition of domicile in Singapore by his conduct. See also *Re Eu Keng Chee* [1961] MLJ 210 and *Re Tan Hong* [1962] MLJ 535. It must also be noted that the statement in the Memorandum of Resealing was made after the death of the deceased. There is no evidence of the circumstances in which it was made. As it stands it is a bare statement on its own. It is a requirement of the law of domicile that the time at which the intention of a deceased person is relevant is whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country. Thus the statement in the Memorandum of Resealing is of little value in the absence of any evidence to show that the deceased had intended to return to China. The evidence on record militates against such a finding being made. Apart from the evidence referred to earlier the fact that at the outbreak of the Second World War the deceased fled to Australia is clear indication that he had never intended to return to China. Apart from the evidence referred to the respondent has failed to discharge the burden on him. No evidence has been led to show that the deceased had revived his domicile of origin. Thus the domicile of the deceased remains as Malaya.

It is therefore our firm finding that the place of domicile of the deceased at the time of his death was Malaya.

(c) The Third Ground

The material part of the judgment of the learned judge with regard to this ground has been reproduced earlier.

The result of our findings thus far is that the requirements of O. 11 r. 1(1)(d) have been satisfied. Thus the Malaysian Courts have jurisdiction to try the action filed by the appellant. That leads to a consideration of whether the Malaysian courts are the appropriate courts or forum conveniens for the adjudication of the action. This is a matter to be considered by the Court in exercising its discretion under O. 11 r. 4. As The Supreme Court Practice 1985 further says at p 81:

> The test is whether the interests of justice are best served by proceedings here or abroad. The same question arises when an application is made to stay proceedings, already begun and validly served within the jurisdiction, on the ground that a foreign court is the forum conveniens. Decisions on such applications are helpful provided that it is remembered that the question, and burden of proof, in such cases is the opposite to that in applications under O. 11; the applicant for a stay must show that it would be right to deprive the plaintiff of the right to sue in England, while under O. 11 the plaintiff is asking for the exercise of the discretion of the court in his favour and must show that the English Court is the forum conveniens.

(See also *American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273.)

The doctrine of forum non conveniens was explained in *Spiliada Maritime Corp v. Cansulex Ltd* [1987] 1 AC 460 as there being some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. It was further held in that case that the word "conveniens" in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. In adopting this principle Peh Swee Chin FCJ in writing for the Federal Court in *American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 said at p 281:

> Having regard to the reasoning of the learned Law Lords in The Spiliada and the learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O. 11 r. 1 of RHC, or for setting aside such leave, it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indisputable when a Malaysian court considers all cases in connection with forum non conveniens.
>
> The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection.

In referring to the "natural forum" as being "that with which the action had the most real and substantial connection" Lord Goff said in the *Spiliada* case at p 478:

> So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Credit Chimique v. James Scott Engineering Group Ltd* [1982] SLT 131), and the places where the parties respectively reside or carry on business.

The respondent in arguing that the forum conveniens is Singapore based his case on the grounds that he is a permanent resident of Singapore; that since 1982 the main office for the administration of the estate has been in Singapore and it became the sole office in 2002 resulting in the administration of the estate being carried out in Singapore for the last 21 years; that 57.81% of the assets of the estate are in Hong Kong, 31.94% in Singapore and only 10.25% in Malaysia; that of the 19 beneficiaries seven are in Singapore, five in

Malaysia and seven elsewhere; and that the order for the investigative audit sought by the appellant would have to be carried out in Singapore. The appellant in contending that the forum conveniens is Malaysia said that the Will in this case is a Malaysian one with the deceased having died domiciled in Malaya; that the grant of probate was issued by the Supreme Court of Malaya in 1949; that the trust had been administered in Malaysia from 1949 to 2002 in support of which the Singapore's Form of Return of Income Tax for 1973, 1975, 1977, 1978, 1981 and 1982 were tendered; that the location of the majority of the beneficiaries is not relevant as this is not a class action and the other beneficiaries are not involved; that the assets being in other countries is not relevant; and that the respondent, not being a resident of Malaysia, cannot be a trustee pursuant to s. 40(1) of the Trustee Act 1949.

This case is an administration action in which the appellant's claim is for an account of the deceased's estate on the footing of wilful default and for an investigative audit to be conducted on the deceased's estate for the previous six years. Clause 10 of the Will makes explicit provision for the inspection and passing of accounts. It reads as follows:

> Thereafter my trustees must call a meeting in January and July of each year, to inspect and pass the accounts for the prior six months.
>
> Further meetings shall also be called to consider any other matter relating to the estate but the finding of such meetings shall not concern any other person dealing with the estate. The minimum number of attendance at such meeting shall not be less than four. The notice for each meeting must be placed on the notice board of the family house. All the eight wives, my male descendents in the male line and my unmarried daughters are able to attend the meeting.

The need for such a meeting has been pleaded in para. 16 of the statement of claim. The various affidavits affirmed by the Respondent do not reveal any compliance with cl. 10 of the Will. Instead para. 8 of the third affidavit of the respondent affirmed on 24 June 2002 reads as follows:

> 8. I deny paragraph 9 of the Affidavit. In any event, I wish to state the following:
>
> 8.1 For the past 40 years, annual audits of the Estate's accounts have been carried out by professional public accountants. Every year, a copy of the audited accounts of the Estate is sent to all the beneficiaries together with their annual distributions.
>
> 8.2 In addition, for the past 40 years income tax returns have been filed annually in Singapore and Malaysia by professional tax accountants on behalf of the Estate, and the tax has been duly paid. The beneficiaries have been kept informed of their tax credit position in respect of the Estate.

This would appear to be at variance with cl. 10 of the Will. The action that has been commenced by the appellant will therefore involve an interpretation of the Will. This will raise questions of the applicable law with a resultant effect on the appropriate forum. In this regard useful reference may be made to *Wong Kai Woon & Anor v. Wong Kong Hom & Anor* [1991] 3 CLJ 3057; [1991] 4 CLJ (Rep) 1183 where Rajendran JC said:

> It is established law that a will is to be interpreted in accordance with the law intended by the testator. In the absence of indications to the contrary, the law is presumed to be the law of his domicile at the time when the will is made (see Dicey and Morris: *Conflict of Laws* 11th Edn at p 1022). In the present case it is not disputed that the testator was domiciled in Singapore at the relevant time and there is no indication in the will that it is to be interpreted by some other law or in some other jurisdiction. The fact that the property consisted of immovables situated in a different jurisdiction does not alter the general rule (see Dicey and Morris at p 1024). I was therefore satisfied that these proceedings were properly instituted in Singapore and that this Court had jurisdiction to construe the will.

The Will was made on 5 February 1947. The deceased died on 27 February 1947. As we said earlier the deceased was domiciled in Malaya at the time of his death. That will clearly include the date on which the Will was made. There is no indication by the deceased of the law pursuant to which the Will is to be interpreted. The applicable law for the interpretation of the Will will therefore be the law of Malaysia. It is also established law that the administration of a deceased person's assets is governed wholly by the law of the country from which the personal representative derives his authority to collect them (see *Preston v. Melville* [1841] 8 C1 & F1; *Re Kloebe* [1884] 28 Ch D 175; *Re Lorillard* [1922] 2 Ch 638; *Charron v. Montreal Trust Co* [1958] 15 DLR (2d) 240). Probate of the Will of the deceased was granted in Malaysia. Thus the administration of the Estate of the deceased must again be in accordance with Malaysian law. The law governing the relevant transaction is an important factor to be considered in determining the appropriate forum as it will have the most real and substantial connection with the action. The fact that the assets of the trust are situated in different jurisdictions is not a relevant matter for consideration. In any event if the argument advanced by the respondent on the location of properties in different places is to be carried to its logical conclusion the appropriate forum ought to be Hong Kong as most of the assets are situated there. The fact that many of the beneficiaries are in different jurisdictions will make no difference as they are not parties in this action. Another factor that will favour this action being tried in the court where probate was granted is the fact that the very position of the respondent being a trustee is being challenged in view of his residence in Singapore. This will have to be determined according to the laws of Malaysia. Thus the appropriate forum will be Malaysia.

In the upshot we were of the unanimous view that the appeal be allowed with costs here and in the court below. Accordingly we set aside the judgment of the High Court and ordered that the deposit be refunded to the appellant. The parties agreed by consent that the defence is to be filed within 30 days.

My learned brother Dennis Ong JCA agrees with this judgment while my learned brother Abdul Aziz JCA is of the view that the question of domicile did not arise for decision in this appeal as he understood learned counsel's submission to mean that he had accepted that the deceased was domiciled in Malaysia. The need to consider the question of the domicile of the deceased in this case is relevant for two reasons. Firstly, it is one of the grounds relied on by the learned judge in arriving at his decision. Secondly, learned counsel did not make any express concession on the issue of domicile. This is particularly significant in light of para. 19 of his written submission which reads as follows:

> Based on the facts set out above, the Plaintiff's claim does not fall within either Order 11 Rule 1(1)(d) or (e) as the deceased did not die domiciled in Malaysia, and the bulk of the Estate assets are not situated in Malaysia.

This part of the written submission of learned counsel was not abandoned by him. It is therefore a matter that requires a decision by this court and must be addressed in this judgment.

Abdul Aziz Mohamad JCA:

I have had the benefit of reading in draft the grounds of judgment of my learned brother, Augustine Paul JCA. Except for one thing, I confirm that the reasons set out by him there were also my reasons for deciding on 21 October 2004 that the appeal should be allowed. The exception is this. In his oral submission in the appeal, on the question of O. 11 r. 1(1)(d) Mr Robert Lazar, the respondents' counsel, contended only that the appellant's action was not one for the administration of the estate of the deceased. As to whether the deceased was domiciled in Malaya when he died, Mr Lazar said that the question did not arise and he did not submit on it. By that I understood him to accept, at least for the purposes of the appeal, that the deceased was domiciled in Malaya. I took it, therefore, that the question did not arise for decision in the appeal, and accordingly, in deciding that the appeal should be allowed, I did not consider the question or form any opinion on it. I therefore do not consider it necessary now to say anything on the question, even though my learned brother has dealt with it at some length.